

JAN 13 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

)
 Redevelopment of Spectrum to)
 Encourage Innovation in the)
 Use of New Telecommunications)
 Technologies)

ET Docket No. 92-9

U S WEST COMMENTS

U S WEST below submits "more specific comment on how tax certificates could be used under the [2 GHz] transition plan," as the Commission has requested. Third Notice of Proposed Rulemaking, 7 FCC Rcd 6886, 6892-92 at ¶ 37 (Oct. 16, 1992). *See also* Separate Statement of Commissioner Andrew C. Barrett, FCC 92-437, at 2-3 (Sept. 17, 1992).

1. Tax Certificates Generally. A tax certificate enables a person who surrenders its regulated property in furtherance of a new or changed Commission policy to defer a tax liability that would otherwise be incurred as a result of the compensation received for such action.¹ The purpose of these certificates "is to mitigate the effect of a forced divestment and to encourage voluntary sales consistent with [the Commission's] policy objec-

¹The Commission had issued several policy statements concerning tax certificates. *See Issuance of Tax Certificates*, 14 F.C.C.2d 827 (1956); 19 R.R.2d 1831 (1970); 59 F.C.C.2d 91 (1976); 92 F.C.C.2d 170 (1982). *See also Statement of Policy on Minority Ownership*, 68 F.C.C.2d 979 (1978). For examples of previous tax certificate letters issued by the Commission, *see Continental Telephone*, 51 F.C.C.2d 284, 288-89 (1975), and *Standard Telephone*, 52 F.C.C.2d 967, 968-69 (1975).

tives."² Or as Commissioner Quello succinctly stated almost two decades ago, tax certificates are "designed to mitigate harm resulting from changing [Commission] policies."³

The Commission has been issuing tax certificates for almost 50 years.⁴ It first used them in connection with traditional broadcast licenses in effectuating its former "one-station-per-market" policy. The Commission has since issued tax certificates in a wide variety of contexts in order to further its policies regarding telephone companies,⁵ television networks,⁶ cable television systems,⁷ and cellular radio systems.⁸

It is important to emphasize that tax certificates do not give recipients a windfall in any way. Tax certificates do not eliminate a recipient's ultimate tax liability resulting from any gains realized from the sale or ex-

²Continental Telephone, 51 F.C.C.2d 284 (1975). See also Continental Telephone, 43 F.C.C.2d 837, 844 (1973)(dissenting statement by Chairman Bunch and two other Commissioners).

³Continental Telephone, 51 F.C.C.2d 284, 291 (1975).

⁴The power to issue tax certificates was first added to the Internal Revenue Code in Section 112(m) of the Revenue Act of 1943. This provision was re-codified without material change as Section 1071 with the enactment of the Internal Revenue Code of 1954, 26 U.S.C. § 1071. Section 1071 was later amended, as part of the 1958 Technical Amendments Act, to clarify that the Commission policies had to be either newly adopted or changed. See S. Rep. No. 1983, 85th Cong., 2d Sess., reprinted at 1958 U.S. Code Cong. & Admin. News 4791, 4862-63, accompanying Pub. L. No. 85-866, Title I, Section 48(a), 72 Stat. 1442 (1958).

⁵See, e.g., Continental Telephone, 51 F.C.C.2d 284 (1975).

⁶See, e.g., E.K. Meade, 27 R.R.2d 1569 (1973).

⁷See, e.g., Minority Ownership of Cable Television Facilities, 52 R.R.2d 1469 (1982).

⁸See, e.g., Tax Certificates (Nonwireline Transfers), 58 R.R.2d 1443 (1985)("Telocator"), recon. denied, 61 R.R.2d 699 (1986).

change of its property; they simply allow a recipient to defer the payment of income taxes — a payment that the recipient would not have incurred but for the Commission's new or changed policy.⁹

2. The Use of Tax Certificates Unquestionably Would Promote the Commission's Policy to Make the 2 GHz Band Available to New and Emerging Technologies as Soon as Possible. The Commission has decided that the public interest would be served by re-developing 220 MHz of spectrum in the 2 GHz band so that spectrum is available for new and emerging technologies. The Commission has further found that new and emerging technology users have "an immediate need" for this spectrum and that this spectrum must therefore be made available as soon as practical.¹⁰ Because the 2 GHz band is already in use, the Commission has proposed a comprehensive transition plan, including use of voluntary relocation agreements, to migrate current 2 GHz users to other bands (or other media) as soon as possible. In order to further these objectives, the Commission should take advantage of any procedure or inducement at its disposal that would facilitate or simplify the use of voluntary relocation agreements.

The issuance of tax certificates would further the Commission's objectives in several ways. First, such certificates would eliminate a major uncertainty facing existing licensees in voluntary relocation negotiations —

⁹The absence of a windfall is further guaranteed by the requirement in the Internal Revenue Code that, if any excess compensation is not reinvested, the taxpayer must either pay the income tax currently on the gain attributable to the excess or reduce the tax depreciation on existing property (*i.e.*, tax basis reductions).

¹⁰Third Notice of Proposed Rulemaking, 7 FCC Rcd at 6888 ¶ 14.

an uncertainty that, if removed, will make the licensee more amenable to relocating its system and doing so sooner. Under the Internal Revenue Code, "the exchange of property . . . for property of like kind" ordinarily is not a taxable event.¹¹ An incumbent fixed microwave user could argue that the payment by a new technology licensee for the purchase of alternate transmission facilities in exchange for vacating its current facilities would be a "like kind exchange" under the Code and, as a result, a non-taxable event. But as a practical matter, however, most existing licensees will be reluctant to enter into a relocation contract without first confirming their position with the IRS.

The use of tax certificates would moot this issue because proceeds of a transaction would not be taxable at the time of the event even if, in their absence, the IRS were to determine that the sale is not "like kind exchange" within the scope of the tax code. Consequently, not only would tax certificates eliminate unnecessary administrative burdens on existing licensees and the IRS but, by removing the uncertainty over the licensee's current tax liability, they would also accelerate voluntary relocation negotiations (thereby accelerating the date when the 2 GHz spectrum can be used for new technologies).

Another benefit of tax certificates is that they will likely reduce the overall relocation cost of embedded systems and will help ensure that new

¹¹Section 1031(a), 26 U.S.C. § 1031(a), provides:

No gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of a like kind which is to be held either for productive use in a trade or business or for investment.

licensees pay a price that approximates the system's actual market value. From the point of view of an existing licensee, incurring a tax liability on the sale or exchange of its 2 GHz system makes the overall cost of relocating to alternative facilities (be they other spectrum or transmission media) relatively more expensive. Such a licensee will understandably demand a higher price in order to compensate it at the net value that the existing licensee believes is fair.¹² Conversely, a new licensee is less likely to pay more than the fair market value of a property merely to keep an existing licensee whole after taxes.

The advantage of tax certificates is that they allow the negotiations to take place without concern for a licensee's specific tax situation. Moreover, tax certificates will likely have the effect of putting existing and new licensees on a more equal footing. For example, the mere fact that one existing licensee may have a net operating loss or capital loss carry-over that can be used against any gain on the sale of its 2 GHz system will not result in disparately low prices being paid as opposed to other existing licensees without such tax benefits available.

Only one of the many commenters addressing this issue has questioned the usefulness of tax certificates.¹³ But as the Commission has held

¹²It bears repeating that it is not inequitable for an existing licensee to demand a premium if that licensee is forced to pay taxes on the sale or exchange. After all, the only reason that the existing licensee is exposed to a tax liability at this point of time is because the Commission has adopted a new or changed policy. Put another way, it is unlikely that incumbent licensees would sell or exchange their assets but for the Commission's reallocation of radio spectrum and resulting relocation policy.

¹³See American Petroleum Institute Reply Comments, at 30 (July 8, 1992) ("API believes that tax certificates will not greatly benefit its member companies").

in the past, that tax certificates may not be useful to some is no reason to deprive others from taking advantage of such certificates.¹⁴

3. The Commission Is Empowered to Issue Tax Certificates to Current 2 GHz Microwave Licensees. The Commission unquestionably has the power to issue tax certificates as part of its 2 GHz re-development transition plan.¹⁵ Section 1071(a) of the Internal Revenue Code, 26 U.S.C. § 1071(a), authorizes the Commission to issue tax certificates in connection with the sale or exchange of property where two criteria are present:

1. The sale or exchange is "necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by, the Commission;" and
2. The relevant policy relates to "the ownership and control of radio broadcasting stations."¹⁶

Both criteria are satisfied in the Commission's proposed 2 GHz re-development transition plan. As explained in the preceding section, the issuance of tax certificates would materially facilitate voluntary relocation

¹⁴See, e.g., Technical Assignment of Criteria for the AM Broadcast Service, 6 FCC Rcd 6273, 6324-25 ¶¶ 162-63 (1991).

¹⁵Consequently, there is no need to commence a negotiated rule making "to develop . . . legal justifications for using the tax certificate in this context." 7 FCC Rcd at 6893 ¶ 37. Nor is there a need to commence a negotiated rule making "to develop specific guidelines . . . for using the tax certificate" (*ibid.*) because certificates should be available to any 2 GHz licensee surrendering its license — regardless of whether the relocation is voluntary or involuntary and without regard to whether the licensee will be migrating to non-radio or other radio media.

¹⁶See Telocator, 58 R.R.2d 1443, 1445 ¶4 (1985), *on recon.*, 1 FCC Rcd 509 (1986).

agreements, thereby making the 2 GHz band available to new technology users sooner than would otherwise be the case. As such, tax certificates are certainly "appropriate," if not "necessary," to effectuate the public policy determinations the Commission has made: the re-development of this spectrum as soon as possible and the innovation of using new and emerging telecommunications technologies.¹⁷

Nor is an extended discussion required over the second criterion; the Commission has exhaustively examined this issue in the past.¹⁸ The important point is that, as discussed above, the Commission has used tax certificates in many non-broadcast settings and, to U S WEST's knowledge, the IRS has never challenged the Commission's action. Equally important, in one of the few occasions that the Commission's discretion to issue tax certificates was challenged, the appellate court confirmed that tax certificates could be issued in a non-broadcast setting.¹⁹ The proposal to use tax certificates as part of the 2 GHz transition plan is thus well within the Commission's authority.

¹⁷It is important to emphasize that tax certificates are appropriate for both voluntary and involuntary sales. In adopting the precursor to Section 1071, the Senate initially proposed use of the phrase, "required by the Federal Communications Commission." See 89 Cong. Rec. 10957. However, in the legislation ultimately adopted, this language was replaced with the phrase, "necessary or appropriate to effectuate the policies of the Commission." See 90 Cong. Rec. 2013, 2050. See also Jefferson Standard Broadcasting, 14 F.C.C.2d 823, 831 (1968)(dissenting statement of Commissioner Cox). Thus, only last year the Commission authorized use of tax certificates to AM licensees that voluntarily surrendered their licenses in order to reduce broadcast interference. See Technical Assignment of Criteria for the AM Broadcast Service, 6 FCC Rcd 6273, 6325 (1991). See generally Telocator, 58 R.R.2d 1443, 1445 ¶ 6 (1985).

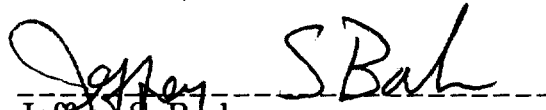
¹⁸See Telocator, 58 R.R.2d 1443 (1985), *on recon.*, 1 FCC Rcd 509 (1986).

¹⁹See Kansas State Network v. FCC, 720 F.2d 185 (D.C. Cir. 1983)(award of a certificate in connection with the divestiture of cable television systems is appropriate).

For all the foregoing reasons, the Commission should issue tax certificates to any fixed microwave licensee currently using 2 GHz spectrum who relocates its system — regardless of whether the licensee is surrendering the spectrum *via* the voluntary or involuntary relocation process and without regard to whether the licensee will be migrating to non-radio or other radio media.

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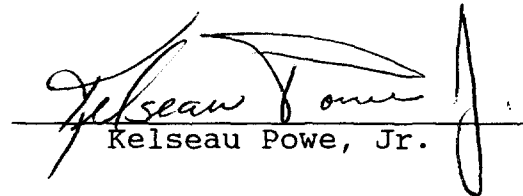
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January 13, 1993

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CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify on this 13th day of January, 1992, that I have caused a copy of the foregoing **U S WEST COMMENTS** to be served, via first class United States mail, postage prepaid, to the persons named on the attached service list.


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